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IN THE

Supreme Court of the United States

October Term, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

PAGE

1. Petitioner Never Waived or Abandoned the Issue of Unseaworthiness 1

2. The Jury Found that the Disclaimer of Liability in the Pass was Not Binding on Petitioner. In Any Event, it Contravenes Public Policy, 46 U. S. C. § 183c 2

Cases Cited

Kermarec v. Compagnie Generale Transatlantique, 2 Cir. 245 F. (2d) 175, 183 3

Moore v. American Scantic Line, Inc., 2 Cir. 1941, 121 F. (2d) 767 3

Pope & Talbott, Inc. v. Hawn, 346 U. S. 706, 74 S. Ct. 202 (Dec. 1955) 1

Rosenthal v. Compagnie Generale Transatlantique, S. D. N. Y. 1953, 14 F. R. D. 33, 36 3

Statutes

46 U. S. C. Sec. 183c 2, 3

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Respondent's brief studiously avoids the basic issues raised by the petitioner. It requires, however, two brief comments:

1. Petitioner Never Waived or Abandoned the Issue of Unseaworthiness.

The complaint alleges that the vessel was unseaworthy (R. 3-4). The pretrial order of April 16, 1953,[1] referred to by respondent (Resp. Br. p. 12), specifically provides that no issue raised by the pleadings is abandoned. The order antedated *Pope & Talbott, Inc.* v. *Hawn*, 346 U. S.

[1] Official Record on file with Clerk (hereinafter referred to as Off. Rec.), pages 315-317.

706, 74 S. Ct. 202 (Dec. 1953) by several months. The late H. W. Goddard, U. S. D. J. who presided at the pretrial conference was then of the opinion that the doctrine was limited only to seamen and longshoremen and did not consider unseaworthiness a real issue in the case.

At the trial, petitioner formally moved to include unseaworthiness as an issue to be submitted to the jury. This was denied by the Court, "as a matter of law."[2] Plaintiff's "Requests to Charge" again raised the issue. It was again denied.[3]

2. The Jury Found That the Disclaimer of Liability in the Pass Was Not Binding on Petitioner. In Any Event, it Contravenes Public Policy, 46 U. S. C. § 183c.

The evidence is undisputed that Yves obtained and retained the pass, and that it was never shown, read or explained to Kermarec (R. 19-20, 47-48).

The Court charged the jury: "Unless you find that the terms of this language was brought home to the plaintiff and that those express terms applied to any particular alleged negligence of the defendant, then you may not find that the pass is binding on the plaintiff" (R. 80). Implicit in the jury's verdict for the plaintiff is the finding of fact

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[2] R. 33. "Mr. Rosow: "May I, before Mr. Garvey makes his motion, may I at this time, your Honor, make a motion to amend the pretrial order so as to include the cause of action for unseaworthiness of the vessel as it relates to this plaintiff.

The Court: I think it is too late to do this at this time. The pretrial order, as I look at it, is dated in 1953 but I do not deny it on the ground that you are late or that there is laches but I will deny it as a matter of law."

[3] Off. Rec., p. 337, Plaintiff's Requests to Charge, Nos. 22, 23.

"Mr. Rosow: I believe we have an automatic exception to these requests—

The Court: You have them anyway. I will put it this way. You have an exception to all the requests that I have not given or that I have denied." (R. 83).

that petitioner was not informed of the disclaimer and that it, therefore, was not binding upon him.

Apart from the question of fact relating to the pass, it is submitted that the disclaimer of liability contravenes the public policy of the United States as set forth in 46 U. S. C. § 183c,[4] and is unenforceable. *Moore* v. *American Scantic Line, Inc.*, 2 Cir. 1944, 121 F. (2d) 767; see dis. op., *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir. 245 F. (2d) 175, 183. See also, *Rosenthal* v. *Compagnie Generale Transatlantique*, S. D. N. Y. 1953, 14 R. F. D. 33, 36.

Respectfully submitted,

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[4] 46 U. S. C. § 183c. *Stipulations limiting liability for negligence invalid*

"It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect." R. S. § 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.